76-1158

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

FRED D. KELLEY and PAUL P. MENZ,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

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Fred D. Kelley and Paul P. Menz, your petitioners, respectfully pray that a writ of certiorari be issued to review the judgments of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cause on December 3, 1976.

OPINIONS BELOW

This cause was decided by a panel of the United States Court of Appeals for the Eighth Circuit on December 3, 1976, in an opinion which has not yet been officially reported. The opinion is reproduced as Appendix A hereto.

On January 24, 1977, the Court of Appeals modified the opinion, by deleting a paragraph thereof, and denied petition-

ers' petition for rehearing and suggestion of appropriateness of rehearing in banc. (See Appendix D.) No opinion was written, except as to the deletion of the paragraph of the original opinion, and the order has not been officially reported.

JURISDICTION

The judgments of the United States Court of Appeals were entered on December 3, 1976. (See Appendix B and C.) A timely petition for rehearing and suggestion of appropriateness of rehearing in banc was denied on January 24, 1977. (See Appendix D.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

Whether in a prosecution under 29 U.S.C. § 530 for intimidating union members in the exercise of their rights, the government failed to make a submissible case, in that:

A. The alleged victims of the intimidation had terminated participation in any activities protected by 29 U.S.C. §§ 411 (a)(1) and 411(a)(2) prior to the alleged assault upon them, including the question of whether the possibility of a chilling effect on future activities provides an unconstitutionally vague standard of violation of 29 U.S.C. § 530.

B. Under *Dunlop v. Bachowski*, 421 U.S. 560 (1975), the alleged victims had no right to contest an election of union officers by circulation of a petition, and therefore they were not acting under the protection of 29 U.S.C. §§ 411(a)(1) and 411(a)(2).

II

Whether the District Court and the Court of Appeals have misapplied the Federal Rules of Evidence, in the following respects:

A. Whether evidence of other prior threats and acts of misconduct by the alleged victims should have been admitted when offered by the defense under Rule 404(b), including the question of whether the word "person" in Rule 404(b) means only the "accused" or has the same meaning of the "accused", a "victim", and any "witness" as in Rule 404(a).

B. Whether grand jury testimony of an admittedly unavailable witness should have been admitted when offered by the defense under Rule 804.

III

Whether petitioners were properly tried, convicted and sentenced to consecutive terms for a conspiracy count and a substantive count involving the same facts.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

Constitution of the United States

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to

be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes of the United States

Title 29, United States Code

§ 411. Bill of rights; constitution and bylaws of labor organizations

(a)(1) **Equal rights.**—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) **Freedom of speech and assembly.**—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

§ 483. Application of other laws; existing rights and remedies; exclusiveness of remedy for challenging election

No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this subchapter. Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this subchapter. The remedy provided by this subchapter for challenging an election already conducted shall be exclusive.

§ 530. Deprivation of rights by violence; penalty

It shall be unlawful for any person through the use of force or violence, or threat of the use of force or violence, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled under the provisions of this chapter. Any person who willfully violates this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

Federal Rules of Evidence

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) **Character evidence generally.** Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) **Character of accused.** Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) **Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) **Character of witness.** Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) **Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

STATEMENT

Petitioners Fred D. Kelley and Paul P. Menz were convicted on Counts I and II of a three-count indictment (R. 1-4) alleging misdemeanor violations of Title 18, United States Code, Section 371 and Title 29, United States Code, Section 530. Petitioners were tried jointly with two other defendants, John Cason and Robert Worthy, who were acquitted on the two counts against

each of them. Petitioners filed separate notices of appeal (R. 28-29), but the appeals were consolidated. They filed a joint brief in the Court of Appeals, which issued a single opinion disposing of their appeals. (See Appendix A.)

The indictment (R.1-4) filed on November 25, 1975, was in three counts. The first count was a misdemeanor conspiracy count under 18 U.S.C. § 371 and charged petitioners Kelley and Menz and co-defendants Worthy and Cason with conspiring through the use or threat of use of force and violence "to restrain, coerce, and intimidate, and attempt to restrain, coerce and intimidate members of a labor organization, for the purpose of interfering with and preventing the exercise of rights to which they are entitled under the provisions of Section 411(a)(1) and 411(a)(2), Title 29, United States Code, in violation of Title 29, United States Code, Section 530." It was alleged that petitioners were officials of the International Laborers Union of North America, Local 282, AFL-CIO, hereinafter in this petition referred to as Local 282, and that they engaged in activities to interfere with rights of union members to meet and distribute a petition. The four overt acts alleged in Count I related to specific events on October 23 and October 24, 1975, which were the same events involved in Counts II and III of the indictment. Petitioners Kelley and Menz were convicted on this Count; Worthy and Cason were acquitted.

Count II of the indictment charged Kelley, Menz and Cason with a substantive misdemeanor violation of 29 U.S.C. § 530 on October 23, 1975, by interfering with the rights of union members Joe Sachse and Owen Innis. The specific rights allegedly abridged were "the rights to meet and assemble freely with other members of Local 282, and to express views, arguments, and opinions." Petitioners Kelley and Menz were convicted on this Count, and Cason was acquitted.

Count III was identical to Count II except that the defendants were Kelley, Menz and Worthy, the date was October 24, 1975,

and the union member allegedly intimidated was Edward Brant. All defendants, including petitioners, were acquitted on this Count.

A jury trial commenced against all four defendants on February 2, 1976. It lasted for five days, and the jury returned its verdict on February 6, 1976 (R. 22-25, Tr. 703-705).

The government's evidence came from witnesses to the incidents of October 23[1] and October 24, 1975.[2] Some of these witnesses were recalled by the defendants for additional evidence.[3] There were other defense witnesses concerning the events of October 23[4] and October 24,[5] as well as character witnesses for petitioners.[6] Each defendant testified.

The evidence tended to show that petitioners Kelley and Menz were the president and secretary-treasurer of Local 282, which operated in a twelve-county area around Cape Girardeau, Missouri. They had served in office for 17 years and were last re-elected on May 3, 1974 (Tr. 580, 628-629). Sometime in the summer of 1975, there had been dissatisfaction among some members of Local 282 (Tr. 11, 100), and after some preliminary meetings, these members decided to circulate a petition complaining about the last election of petitioners (Govt. Exh. 1, Tr. 10-16, 298-299, 403-411, 418-423, 425-432).

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[1] Sachse, Innis, Dover, McGuire, Sides, Yarbro, Reynolds, and Perryman. In addition, witness Seib identified statements made by the defendants, and he and witnesses Briner, Corby, Jackman, and Miller testified concerning a gun and bullets. This testimony related to substantive Count II.

[2] Brant, McCall, Harper, Stricklin, and Tomlin. This testimony related to substantive Count III.

[3] Jackman, Brant, and Stricklin.

[4] Pearce.

[5] Riley, Lancaster, Dougherty, Shaffer, Dwight Kelley, and Kitchen.

[6] Pearce, McLain, Harris, Wood, and Ebaugh.

In the early morning of October 23, 1975 (see Count II), Sachse and Innis, together with Dallas Dover who was not then a member of Local 282, came to the sewage disposal plant job site in Cape Girardeau, where some members of Local 282 were working. They went down into a deep excavation to discuss their petition and hopefully to secure signatures on it (Tr. 16-17, 51, 101-107, 153-155, 172-175). They did not wear hard hats or report to the construction office, as required by a large sign (Deft. Exh. A, Tr. 44, 46, 130-131, 165-166, 180-181).

While the three men were talking to Local 282 members, defendant Cason, who was acting steward (Tr. 553), asked the men what they were doing and then called Kelley, who was President and Business Representative of Local 282. He told Kelley that the men were circulating a petition. Kelley and Menz, who was Secretary-Treasurer and Business Manager of Local 282, proceeded to the job site in Menz's red and white Cadillac. In the meantime, the three men had completed their discussions with Local 282 members on the job, and they were leaving in the Innis truck just as Kelley and Menz arrived (Tr. 17-19, 107-110, 155-160, 175-177, 553-560). At this point, there is a conflict in the testimony as to the events which then followed.

Prosecution witnesses testified that as the truck was leaving, Kelley threw a baseball bat at it. The truck then proceeded out of the job site area and went to a service station in Cape Girardeau. While the truck was at the station, the Menz car passed by, and Kelley fired three pistol shots at the Innis truck (Tr. 19-25, 111-117, 191-196, 212-214, 223-228, 233-237). A spent bullet was found at the service station lot (Govt. Exh. 2, Tr. 249-252). There was a discrepancy among the various witnesses as to whether there were one, two or three persons in the Menz car (Tr. 90-91, 116, 195, 226, 236).

The defense version of these events was that as the Innis truck came abreast of the Menz car at the sewage disposal plant

job site, Sachse was seated at the window on the passenger side and fired a pistol in the direction of the Menz car, the bullet passing over the heads of Kelley, Menz and Cason. (Sachse denied the shooting, although he, Innis and Dover admitted having a shotgun in the truck (Tr. 25, 27-30, 47-49, 61, 73-74, 103, 117, 135, 143, 144-147, 164, 169-170).) At that point Kelley grabbed a baseball bat which had been in the Menz car and threw it at the truck. When Kelley, Menz and Cason left the job site, they did not pass by the service station and did not fire any shots at the Innis truck. Instead they took the road behind the station and went to East Cape, Illinois, where they decided to go back to Cape Girardeau and make a complaint to the prosecuting attorney about the shot which was fired at them by Sachse (Tr. 506-511, 560-566, 588-599, 630-639). The defendants suggested that the shots may have come from a red and white Lincoln owned by Jim Bollinger, an associate of the dissident members of Local 282 (Tr. 77, 231, 244-245).

Jackman testified that the night before this incident he had received a call from Menz who then came to the Jackman house. Jackman sat in the Menz car and they had a pleasant conversation about Jackman's intention to run against Menz at the 1977 election. While seated in the Menz car, Jackman noticed what he believed to be a .38 caliber pistol (Tr. 299-302). (Menz testified that it was a flashlight (Tr. 586-588).) The implication of Jackman's testimony was that this may have been the gun used the next day, for the slug found at the service station could have been a .38 (Tr. 280-283, 295-296). Shortly after the alleged shooting in Cape Girardeau, there whas a phone call to the Noranda Aluminum job site in New Madrid, Missouri, about the incident. Jackman, Brant and several other members of the dissident faction of the union left the Noranda job during working hours and met all day with other dissidents and with a representative of the National Labor Relations Board (Tr. 337-340, 406-408, 419-420, 428-429, 434-435, 459-463).

On the following day, October 24 (see Count III), Menz and Kelley drove to the Noranda site with several other men including Worthy (Tr. 324-325, 360-363, 370-371, 377-378, 390, 493-494, 602). The men were brought for protection and also to put to work in the event the laborers who left the day before had not returned and had to be replaced (Tr. 444-445, 500, 535, 599-602, 641-642). Menz learned that Jackman, who was general foreman and steward, was still not on the job, and, pursuant to his authority under the collective bargaining agreement (Tr. 457-458, 605), he appointed a new general foreman and a new steward (Tr. 463-465, 477, 603-606). He then requested to see Brant, a foreman (Tr. 323), because he wanted to inform him of the changes (Tr. 606-607).

When Brant arrived, there was a brief discussion, Brant claiming that Menz said the illegal petition had to stop. Defense witnesses denied that there was any reference to the petition (Tr. 609, 645-646). Then Worthy began to threaten Brant, but the problem soon dissolved when one or two of the men with Kelley and Menz stepped between them. Prosecution witnesses testified that at this point Kelley made a threatening gesture toward Brant as if he had a pistol in his pocket, and one witness claimed to have seen the butt of a pistol (Tr. 328-336, 363-367, 372-374, 378-384, 391-396). Defense witnesses denied that there was a gun or any threats by Kelley (Tr. 436-440, 442, 446-451, 465-466, 477-481, 495-498, 500-503, 537-540, 607-613, 643, 645-649). All defendants were acquitted on Count III (R. 22-24, Tr. 704-705).

At the close of all the evidence, the Court overruled petitioners' motion for judgment of acquittal (R. 16, Tr. 670). The cause was submitted to the jury after argument (Tr. 670) and the Court's charge to the jury (Tr. 670-699), to which petitioners made certain objections (R. 17-21, Tr. 699-703).

As previously indicated, the jury returned verdicts (R. 22-25, Tr. 703-705) finding petitioners guilty of conspiracy and

intimidation of Sachse and Innis at the sewage treatment plant on October 23 (Counts I and II), and acquitted petitioners of intimidation of Brant at the Noranda job on October 24 (Count III). The jury also acquitted Cason of conspiracy and intimidation as to the sewage treatment plant (Counts I and II), and acquitted Worthy of conspiracy and intimidation as to the Noranda job (Counts I and III). Thus, the jury acquitted all defendants of any charges related to the Noranda job, except possibly insofar as they were included in the conspiracy convictions of petitioners.

On February 23, 1976, petitioners were each sentenced to the maximum term of one year confinement on each count, the sentences to run consecutively for a total of two years (R. 26-27, Tr. 707-710).

Each petitioner duly filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit (R. 28-29), and remained free on bond pending appeal (Tr. 710). The appeals were consolidated, and on December 3, 1976, a panel of the Court of Appeals filed an opinion (Appendix A) affirming the convictions. Petitioners' timely petition for rehearing and suggestion of appropriateness of rehearing in banc was denied on January 24, 1977, but the Court of Appeals modified the opinion by deleting one paragraph thereof. (See Appendix D.)

The Court of Appeals declined to stay its mandate, and on February 8, 1977, Mr. Justice Blackmun in No. A-648 denied petitioners' application to this Court for a stay of the mandate. Petitioners are presently confined at the Federal Correctional Institution at El Reno, Oklahoma, which they entered on February 11, 1977, pursuant to their convictions.

This joint petition for a writ of certiorari seeks to review the judgment of the Court of Appeals affirming petitioners' convictions.

REASONS FOR GRANTING THE WRIT

I

Submissible Case

Title 29, United States Code, Section 530, the criminal misdemeanor statute under which petitioners' prosecution arose, has been seldom invoked—and never in any reported case of facts similar to those in this case. The importance of this petition for certiorari is that, if this prosecution is sanctioned, the floodgates will be opened to inundate federal courts with matters which should be cognizable only in local courts.

Although the conduct of petitioners, if government witnesses are believed, may have been a violation of state or local laws, this case should not have been tried in the federal court or submitted to the jury herein. The prosecution failed to make a submissible case of a violation of Section 530, or of a conspiracy to violate that section, for two reasons:

A. Sachse and Innis, the union members allegedly intimidated, were not at the time of the incidents in evidence exercising any rights granted to them by 29 U.S.C. §§ 411(a)(1) or 411(a)(2); by that time they had terminated their protected activities; and

B. In any event, their activities in seeking a new election were not within the appropriate framework of remedies available to contest an election and therefore were not rights granted by 29 U.S.C. §§ 411(a)(1) or 411(a)(2).

A

Count II of the indictment charged that petitioners and Cason "did knowingly, willfully, and unlawfully, through the use of

force and violence, and through threats of the use of force and violence, restrain, coerce and intimidate and attempt to restrain, coerce, and intimidate Joe Sachse and Owen Innis, members of Local 282, for the purpose of interfering with and preventing the exercise of their rights to which they are entitled under the provisions of Sections 411(a)(1) and 411(a)(2), Title 29, United States Code, that is, the rights to meet and assemble freely with other members of Local 282, and to express views, arguments, and opinions." This was alleged to be a violation of 29 U.S.C. § 530.

Section 530 does not cover every assault or threat or intimidation; it must be against a union member and only with reference to a right which that union member possesses under Chapter 11 of Title 29, United States Code. In the instant case there was no dispute that Sachse and Innis were members of the union, but there was an issue as to whether they were exercising a Chapter 11 right of which they were deprived. The indictment specifically referred to rights under §§ 411(a)(1) and 411(a)(2), but limited it to "the rights to meet and assemble freely with other members of Local 282, and to express views, arguments, and opinions"—the language of § 411(a)(2).

As previously noted, there are very few reported cases of prosecutions under § 530, and none with facts analogous to the case here. It would seem that the dearth of authority is a result of the refusal to invoke this federal law in factual situations which are more appropriate in state or local jurisdictions.

We believe that a strict construction of this federal criminal statute necessitated an acquittal of petitioners. There was absolutely no evidence that Sachse or Innis were prevented from meeting or assembling with other union members or expressing their views, arguments and opinions. In fact, the evidence was quite to the contrary, for there was no dispute that Sachse and Innis (and their non-member cohort Dover) had full opportunity

to meet and assemble and talk with the laborers on the sewage disposal plant job.[7]

Not only was there no evidence that Sachse and Innis had been interfered with in talking to the union members on the job, but their testimony clearly showed that they had completed their activities without interference and were leaving the job site when the first altercation with the baseball bat took place; they were three-quarters of a mile to a mile away from the job site and from any other union members when the alleged shooting took place at the service station (Tr. 23, 64).

Sachse testified that nobody interfered with him in getting three signatures on his petition or in talking to a fourth man who declined to sign (Tr. 49-50), and he did not see anybody interfering with Innis (Tr. 53). He acknowledged that they had decided to leave and were in the process of leaving when they first saw petitioners, and that they had "completed the business" that they had come there for (Tr. 53-54).

Innis testified that they were leaving because they "had no further business there" (Tr. 109), and that nobody interfered with his talking to the men or getting signatures (Tr. 131). Dover corroborated that they had completed all of the work of getting signatures before they even saw petitioners (Tr. 166).

Thus, at the time of the alleged activities of petitioners, Sachse and Innis were not engaged in the exercise of any of the rights to which they were entitled under § 411; they were not interfered with or prevented from exercising any such rights.

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[7] As a matter of fact, according to safety standards and common sense, they should not have been there without company permission and without hard hats (see Deft. Exh. A, Tr. 180). Their interference with union employees who were working (Tr. 166) could have jeopardized the labor-management contract between Local 282 and the employer. Compare the proviso of 29 U.S.C. § 411(a)(2) which specifically does not give the right to interfere with contractual obligations of the union.

If they had a right to solicit signatures to their petition, they had already completed their activities and were leaving. Any assault on them after that time could only have been a state or local offense—not a violation of 29 U.S.C. § 530.

But the opinion of the Court of Appeals rejected this argument by alluding to a possible future intimidatory effect, and concluded that "the chilling effect of the incidents in evidence upon Sachse's and Innis' subsequent exercise of their right to meet and assemble, or to express views and opinions, is clear." The Court of Appeals was indulging in speculation, because there was absolutely no evidence of an effect upon future conduct of Sachse, Innis, or anyone else.

A more serious deficiency, of constitutional magnitude, becomes apparent when the rationale of the opinion below is analyzed in the light of Fifth Amendment requirements. To permit a charge in such vague terms as the indictment herein, under a statute as vague as § 411(a)(2), to be sustained by speculation of a potential chilling effect of indefinite future conduct is contrary to the Due Process Clause. The "chilling effect" on legitimate activities of a union officer is a greater danger under the interpretation of the Court of Appeals.

We respectfully suggest that certiorari should be granted to review this unconstitutional application of this vague and, until now, seldom-interpreted statute.

B

The meetings of union members around the dissident leadership of Jackman and Bollinger were aimed in one direction—to get a new election of officers. See, for example, the testimony of Jackman (Tr. 299, 301, 305, 403-406). That the sole concern of the dissident members was to secure a new election is

obvious from the petition which Sachse, Innis and Dover were circulating on October 23 at the sewage disposal plant. A reading of that petition (Govt. Exh. 1) shows that it contained accusations against the conduct of the previous election in May, 1974 (compare with 29 U.S.C. § 481), and implicit in the petition was a suggestion that a new election should be held. Sachse and Innis both testified that the purpose of the petition was to try to obtain a new election (Tr. 41-43, 125-126).

But under the decision of this Court in *Dunlop v. Bachowski*, 421 U.S. 560 (1975), no new election could be obtained in the manner sought by Sachse and Innis; therefore their activities would not have been protected under § 411(a)(2), and there could not be any basis for prosecution under § 530.[8] *Dunlop* holds that remedies for obtaining new elections are provided by the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 401 et seq., and unless the provisions of the Act are complied with, no other method may be used for obtaining a review of the election. Thus, as pointed out in *Dunlop*, 29 U.S.C. § 483 provides that the "remedy provided by this subchapter for challenging an election already conducted shall be exclusive." And, as said in *Dunlop:*

> "Provisions concerning the conduct of the election itself, however, may be enforced only according to the post-election procedures specified in 29 U.S.C. § 482. Section 483 is thus not a prohibition against judicial review but simply underscores the exclusivity of the § 482 procedures in post-election cases."

From a reading of the *Dunlop* case, it is obvious that individuals may not employ other means to contest an election, except as provided in LMRDA. Indeed, the Court of Appeals herein recognized "that the effort to obtain a new election by petition was foredoomed."

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[8] Note that § 411(a)(2) specifically guarantees the right to express views on election matters, but only "at meetings" of the union.

Therefore, when Sachse and Innis were soliciting for a new election, they were not engaged in protected activity under § 411(a)(2). Unless they were exercising rights which they were given in § 411(a)(2), petitioners could not be prosecuted under § 530. As pointed out in Section A, the application of a strict construction to §§ 411(a)(2) and 530 must lead to the conclusion that their testimony may have been sufficient to generate a state or local prosecution, but not federal.

Dunlop cited other cases to support the ruling that the remedy provided by LMRDA is exclusive. Note particularly the language quoted from *Trbovich v. United Mine Workers*, 404 U.S. 528(1972):

> ". . . Congress intended to prevent members from pressing claims not thought meritorious by the Secretary, and from litigating in forums or at times different from those chosen by the Secretary." (404 U.S. at 536).
>
> ". . . The statute gives the individual union members certain rights against their union and 'the Secretary of Labor in effect becomes the union member's lawyer' for purposes of enforcing those rights . . ." (408 U.S. at 538-539)

Thus, this Court has recognized that union members have certain rights, but those rights are granted strictly according to the statute. *Dunlop* and the cases relied upon make clear that a member does not have a statutorily protected right to contest an election in a manner other than as set out in the exclusive remedy provided by the statute. The attempt to use some other unprotected type of remedy could not be a basis for complaint of a criminal violation under § 530.

Compare *Fennelly v. Local 971*, 400 F. Supp. 375 (D. Mass. 1975), where the Court recognized the exclusivity of the election contest remedy in 29 U.S.C. § 482. In addition, the Court

rejected the argument that it had jurisdiction under the "Bill of Rights" of 29 U.S.C. § 411(a)(1).

The Court of Appeals has disregarded the effect of this Court's decision in *Dunlop v. Bachowski*; we respectfully suggest that certiorari should be granted to review this conflict.

II

Misapplication of Federal Rules of Evidence

The new Federal Rules of Evidence have already generated much comment and litigation. Two of these Rules have been interpreted in this case in a manner contrary to the spirit as well as the language of the Rules, and we respectfully suggest that this departure from the Rules of Evidence should be reviewed by this Court.

A. Other threats and acts—Rule 404(b)

As to the incident at the Cape Girardeau sewage disposal plant (Count II and part of Count I), the government's evidence was that petitioners were the aggressors and made a shooting assault upon Sachse and Innis. Defense evidence was that Sachse fired the first and only shot, and that the only violent act of petitioners was a retaliatory throwing of a baseball bat by Kelley immediately after Sachse had fired a weapon at Menz and Kelley. Thus, contrary to the suggestion at fn. 6 of the opinion below, there was a crucial factual dispute as to who was the aggressor on October 23, 1975.

The motive and intent of Sachse, Innis and their associates were certainly relevant to this issue, and to prove their motive and intent, the defendants attempted to cross-examine the government witnesses as to acts of misconduct and threats directed to petitioners and other loyal members of Local 282. The issue

was raised prior to cross-examination of the government's first witness, Sachse (Tr. 37-40). The prosecutor objected in advance to cross-examination concerning an assault by Sachse on a Mr. Penney, a member of Local 282, who was beaten because of his association with petitioners. According to defendants' offer of proof, Mr. Penney was told that his beating "is what all of the Kelley-Menz crowd is going to get" (Tr. 38). The defense also predicted evidence of other threats and assaults by Sachse, aimed at discrediting Kelley and Menz, and of threats to Kelley, Menz, and members of their families. Sachse was also present when threats were made to another close associate of Kelley and Menz (Tr. 38). When an effort was made to develop the facts of this latter incident on further cross-examination of Sachse, by attempting to show that he and Jackman were present at a time before the October 23 events when their cohort Bollinger told a loyal supporter of Mr. Kelley that "he would take over Local 282 and get the Kelleys if he had a badge and a gun and immunity," the Court sustained all objections to the questions, apparently because the defendants were not present (Tr. 92-94). The cross-examination of Innis was also restricted concerning his participation in efforts to replace Kelley and Menz, and his harassment of the wife of a loyal union member (Tr. 149-150).

Sachse and Innis were crucial government witnesses against the defendants concerning the October 23 incident at the Cape Girardeau sewage disposal plant. They were named as the alleged victims of the intimidation charged in Counts I and II. "A searching and wide ranging cross-examination" was required and should have been permitted in order to attack their credibility and veracity and to show their motives and intent in accusing the defendants. *United States v. Dickens*, 417 F. 2d 958, 959-960 (8th Cir. 1969).

When the issue of other acts and threats first came up before the cross-examination of Sachse (Tr. 38), defense counsel di-

rected the Court's attention to Rule 404(b) of the Federal Rules of Evidence. In addition, the defendants cited *United States v. Calvert*, 523 F. 2d 895, 905-908 (8th Cir. 1975), cert. denied, 424 U.S. 911 (1976), where evidence of other acts and uncharged crimes of the defendant were held to be admissible on the authority of Rule 404(b), which "is consistent with the common law and with the decisions of this Circuit." But the District Court refused to follow *Calvert* in the mistaken belief that it was distinguishable because the *Calvert* case involved accusations against the defendant and here it involved a witness. The Court made the following comment (Tr. 39): "Against the defendant to show motive, but this is a different deal, that is, witness."[9]

The trial Court's reasoning was erroneous, for Rule 404(b) refers to "a person" and not just the defendant or an accused. Note that Rule 404(a) also uses the word "person", and then the various subsections of Rule 404(a) indicate that "a person" includes the "accused", a "victim" or a plain "witness". Obviously, the trial Court's restriction here of Rule 404(b) was much too limited.

The Court of Appeals in its original opinion (Appendix A) rejected petitioners' interpretation of Rule 404(b) in a manner consistent with Rule 404(a), and stated that "it is clear that Rule 404(b) must be confined to efforts to introduce evidence of 'other crimes' of the accused." This language was, however, deleted from the opinion in the ruling on the petition for rehearing (Appendix D)—but there is no doubt in reading what remains of the opinion that the Court of Appeals has adhered to its erroneous interpretation of Rule 404(b). (See the paragraph preceding the one stricken where the Court of Appeals em-

[9] The Court had earlier permitted evidence of other alleged threats by Kelley, over objection of all defendants (Tr. 27-28).

phasized the words "as the accused".)[10] It is inconceivable that the drafters of the Federal Rules of Evidence intended that Rule 404(a) meant "person" to include all three, but that Rule 404(b) meant "person" to include only "the accused".

The *Calvert* opinion should be read for its extensive analysis of the application of the rules of admissibility of evidence of other acts of misconduct to show motive, intent, preparation and plan. See also *United States v. Clemons*, 503 F.2d 486, 488-491 (8th Cir. 1974), decided before the adoption of Rule 404(b) but cited in the opinion herein, which laid down the following criteria for admissibility of evidence of other crimes to show "motive, intent, preconceived plan," etc. (l.c. 489):

> "Before any such evidence is admitted, however, it must be shown that (1) an issue on which other crime evidence may be received is raised; (2) that the proffered evidence is relevant to that issue; (3) that the evidence is clear and convincing; and (4) that the probative worth outweighs the probable prejudicial impact.[11]

Certainly in the instant case there was such an issue, for the jury had to decide whether the defendants or Sachse and Innis were the aggressors and provokers of the disturbance which occurred. In this respect, cases involving homicides and assaults and the crucial issues of self-defense and determination of who

[10] That same paragraph of the opinion commences with the statement that the doctrine of Rule 404(b) "has been traditionally one of exclusion," but the report of the House Committee on the Judiciary, 93-650, November 15, 1973, commented about the changes in the Rule to its present form that "this formulation properly placed greater emphasis on admissibility . . ."

[11] The trial Court here made no findings as to the last two guidelines of the *Calvert* and *Clemons* tests, that is, the sufficiency of the proof and the probative value compared to danger of prejudice. Instead the Court abdicated its responsibility by taking the position that evidence of this nature is not admissible as to a witness, but just against a defendant. As previously indicated, Rule 404(b) makes no such distinction.

was the aggressor are relevant. See, for example, *United States v. McIntire*, 461 F. 2d 1092 (5th Cir. 1972), and *United States v. Burke*, 470 F. 2d 432 (D.C. Cir. 1972). Compare *Wakaksan v. United States*, 367 F. 2d 639, 645 (8th Cir. 1966), cert. denied, 386 U.S. 994 (1967).

The events sought to be introduced related to acts or threatened acts of violence by the alleged victims Sachse and Innis and their cohorts which occurred during the time that they were meeting and attempting to discredit the leadership and membership of Local 282. Evidence of threats and assaults by Sachse, Innis and Bollinger would have proved a course of action that had obviously been agreed upon by them and their associates at the numerous meetings of the dissident faction. The defense that the dissident group was engaged in a conspiracy of their own was fully explained to the trial Court (Tr. 306).

At the end of its discussion on this issue involving Rule 404 (b), the Court of Appeals affirmed the trial Court by application of the doctrine that there was no "clear showing of abuse of discretion." Although Rule 404(b) does use the word "may" as to admissibility of other crimes evidence, we suggest that the Court of Appeals has misconstrued the standards governing the exercise of discretion. See the notes of the Advisory Committee on the Proposed Rules. It is not just a question of what evidence may already be in the case—instead the discretionary factors relate to prejudice, confusion, waste of time, etc. See also the report of the Senate Committee on the Judiciary, 93-1277, October 11, 1974.

The evidence of the prior acts of misconduct by the alleged victims herein was admissible to show their motive and intent in making the accusations against petitioners. It was relevant also on the issue of who was the aggressor and who assaulted whom. The exclusion of the evidence certainly was erroneous on the trial Court's theory and cannot be justified on any theory adopted by the Court of Appeals.

The danger of the opinion below is not only in its adverse effect upon these petitioners, but also in its restrictive interpretation of Rule 404(b) and the consequent effect upon other trials in which relevant evidence pertaining to acts by a victim or any witness will be excluded. We respectfully suggest that such an emasculation of Rule 404(b) should be reviewed by this Court.

B. Absent witness' grand jury testimony—Rule 804

Brenda Williamson was a secretary of Alberici-Fruin-Colnon who was on the premises at the Noranda job site on October 24, 1975. She had appeared before the grand jury during its investigation of this matter and was questioned by government counsel. She was served by defendants with a subpoena for trial, but could not attend because she had just been released from the hospital after having suffered a cerebral hemorrhage. The government stipulated that she was unavailable as a witness (Tr. 470-471).

Defendants sought to use portions of her grand jury testimony (page 2—page 6, line 5, and page 6, line 24—page 7, line 6 of Court's Exh. 1), but the trial Court refused to permit it for the reason that it was not relevant (Tr. 472). Later the trial Court said her testimony would be misleading (Tr. 473-474). We believe the trial Court's action was clearly erroneous on either ground stated, and that the transcript was admissible under Rule 804 of the Federal Rules of Evidence.

The absence of Miss Williamson met the test of Rule 804(a)(4) because she was then "unable to be present or to testify at the hearing because of . . . then existing physical . . . illness or infirmity." The government so stipulated (Tr. 471). Under these circumstances, her testimony was admissible under Rule 804 (b)(1).

The Court of Appeals, without even referring to the clear language of Rule 804, rejected her testimony as irrelevant because not related to the events of the day before. Her testimony was certainly relevant to the issues being tried, because she said that she saw Kelley in the office and was positive that she did not see a weapon on him. There was other evidence in the case concerning weapons, and her testimony that she did not see a gun in Kelley's possession on October 24 was just as relevant as the testimony of witness Stricklin that he saw a gun in Kelley's possession on October 24 (Tr. 382-384), and the implication in the testimony of numerous other witnesses that he had a gun on that date (Tr. 334-336, 364-366, 372-374, 392-395). It was just as relevant, time-wise, as the testimony of witness Jackman that on October 22 he saw a gun in the possession of defendant Menz (Tr. 299-302). If Jackman could testify that there was a gun one day prior to the incident, then certainly Ms. Williamson's testimony as to the lack of a gun one day afterward was equally relevant. The jury should have been allowed to consider such testimony and give it whatever weight they desired.

The Court of Appeals ignored the clear command of Rule 804 as to the admissibility of Ms. Williamson's grand jury testimony. We respectfully suggest that certiorari should be granted to give effect to this Rule.

III

Two Counts and Sentences

Petitioners were convicted on Counts I and II of the indictment (R. 1-4). Count I charged conspiracy under 18 U.S.C. § 371 to violate 29 U.S.C. § 530, and Count II charged a substantive violation of 29 U.S.C. § 530. The allegations of the indictment and the proof left no doubt that the conspiracy

to violate 29 U.S.C. § 530 as charged in Count I was no different in any material respect from the substantive charge of Count II, and therefore the Fifth Amendment provision against double jeopardy voids the conspiracy charge.

In *Blockburger v. United States*, 284 U.S. 299, 304 (1931), this Court said:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not."

The instant case falls squarely within this rule, for the record clearly shows that the government relied upon the very same evidence to prove the substantive violation and to establish the conspiracy. There was no difference in the proof of the two counts, and the same activities of petitioners gave rise to criminal liability under both 18 U.S.C. § 371 and 29 U.S.C. § 530. The government therefore should have been required to elect between the counts. (Prior to trial, the defendants jointly moved to dismiss the indictment or alternatively to require the government to elect on Fifth Amendment double jeopardy and Eighth Amendment cruel and unusual punishment grounds; the motions were denied.)

Although the instant case is not the type contemplated in the formulation of Wharton's Rule (for the reason that concerted criminal activity is not required for a violation of 29 U.S.C. § 530), nevertheless what this Court said of Wharton's Rule in *Iannelli v. United States*, 420 U.S. 777 (1975), should apply here:

> "Thus, absent legislative intent to the contrary, the Rule supports a presumption that the two merge when the substantive offense is proven."

There certainly could not have been any legislative intent that each participant in a completed misdemeanor offense (§ 530) should get double punishment via a conspiracy charge, especially where the proof is identical. See also *Bell v. United States*, 349 U.S. 81, 83-84 (1955), and *Prince v. United States*, 352 U.S. 322 (1957). Therefore the Court should not have imposed consecutive maximum sentences of imprisonment on each count (R. 26-27, Tr. 710).

This Court is certainly aware of the many cases in all courts, including this Court, wherein prisoners complain of violations pertaining to multiple counts and consecutive sentences. We respectfully suggest that it would be appropriate for this Court now to establish guidelines for use of conspiracy charges and for consecutive sentences. This case presents such an opportunity.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion

United States Court of Appeals
For the Eighth Circuit

No. 76-1208
and
No. 76-1209

United States of America,
Appellee,
v.
Fred D. Kelley and Paul P. Menz,
Appellants.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: September 13, 1976

Filed: December 3, 1976

Before Gibson, Chief Judge, Stephenson, Circuit Judge and Markey,* Chief Judge.

Markey, Chief Judge, U. S. Court of Customs and Patent Appeals.

These are separate, consolidated appeals by Fred D. Kelley and Paul P. Menz, each found (a), guilty of conspiracy, under 18 U.S.C. § 371 "to restrain, coerce, and intimidate, and attempt to restrain, coerce and intimidate members of a labor organization, for the purpose of interfering with and preventing the exercise of rights to which they are entitled under the provisions of Sections 411(a)(1) and 411(a)(2), Title 29, United

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* Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

States Code, in violation of Title 29, United States Code, Section 530," and (b), guilty of a substantive violation of 29 U.S.C. § 530 in interfering with the rights of union members Sachse and Innis "to meet and assemble freely with other members of Local 282, and to express views, arguments, and opinions." We affirm.

Background

Kelley and Menz were president and secretary-treasurer of Local 282 of the International Laborers Union of North America, AFL-CIO, for 17 years, having last been elected in May, 1974. Dissatisfied union members began circulating a petition complaining about that election. On October 23, 1975, Sachse, Innis, and Dallas Dover (not then a member of Local 282) came to a job-site where Local 282 members were working to discuss and seek signatures on the petition. Kelley and Menz, on learning of these activities, proceeded to the job-site in Menz's red and white Cadillac, arriving as Sachse, Innis and Dover were leaving the site in Innis' truck.

Prosecution witnesses testified that Kelley threw a baseball bat at Innis' truck; that, when the truck stopped at a service station, Kelley fired three shots at it; and that a spent bullet was found at the service station.

Defense witnesses testified that Sachse fired a pistol at the Menz car as it passed the truck on arrival at the job-site (Sachse admitted having a shotgun in the truck but denied shooting any gun); that Kelley threw the bat in retaliation for the shooting; that Kelley and Menz did not pass the service station or fire any shots at the truck; that the shots may have come from a red and white Lincoln, owned by another dissident member of Local 282.

A witness said he'd seen what he thought was a .38 caliber pistol in Menz' car the night before the foregoing incidents.

There was testimony that the gas station bullet may have been .38 caliber. Menz said the witness had seen a flashlight, not a gun, in his car.

After a jury verdict of guilty on the two counts above described, and of acquittal on a third count, Kelley and Menz were each sentenced to one year confinement on each count, the sentences to run consecutively. Appellants have remained free on bond pending appeal.[1]

The issues are whether the district court erred in (1) submitting the cause to the jury under Title 29, United States Code, §§ 530, 411(a)(1)(2); (2) excluding cross-examination of Sachse and Innis respecting threats against Kelley, Menz and other union members; (3) excluding grand jury testimony of Brenda Williamson; and (4) refusing to require election between Counts I and II, and imposing consecutive sentences on Counts I and II.

Opinion

Regarding submission to the jury, Kelley and Menz argue that no violation of or conspiracy to violate Section 530 of Title 29, United States Code was shown because:

(a) Sachse and Innis had terminated their protected activities under 29 U.S.C. § 411(a)(1) or § 411(a)(2) when the incidents in evidence occurred; and

(b) The activities of Sachse and Innis were not among the proper remedies available to contest an election and thus were not protected under § 411(a)(1) or § 411 (a)(2).

The argument borders the frivolous. The exercise of a right may be frustrated as much by retaliation as by prevention or interruption. It is obvious that acts of violence immediately

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[1] Two alleged co-conspirators were acquitted of all charges.

following or otherwise directly relating to an activity stultify the ensuing repetition of that activity by an intimidated victim and by others as well. The chilling effect of the incidents in evidence upon Sachse's and Innis' subsequent exercise of their right to meet and assemble, or to express views and opinions, is clear.

The activities surrounding the effort to obtain signatures on a petition for a new election are clearly protected under 29 U.S.C. § 530. 29 U.S.C. § 411(a)(2) specifically cites the right "to meet and assemble freely with other members" and "to express any views, arguments or opinions."[2]

That the effort to obtain a new election by petition was foredoomed (see, *Dunlop v. Bachowski*, 421 U.S. 560, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975), holding that 29 U.S.C. § 482 exclusively governs post-election procedures) does not render even that effort an unprotected activity. It can hardly be said that the statutory provision against intimidation and coercion of union members is limited to protection of activities likely to prove legally effective. That Kelley and Menz may have wasted their efforts against an activity doomed to eventual legal failure cannot change the coercive effect of those efforts upon the rights of Sachse and Innis to meet and assemble and to express views and opinions. Limitation of union members' rights to those activities likely to achieve legal success would defeat the congressional intent expressed in the Labor Management Reporting Disclosure Act of 1959, as amended, of which 29 U.S.C. § 530 and § 411(a) (2) are provisions.

On the second issue, we think the district court properly excluded evidence, proffered during cross-examination and intended to show that Sachse and Innis directed threats and vio-

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[2] Citing the recognition in §411(a)(2) of a union's right to enforce reasonable rules against interference with its performance of contract obligations, Kelley and Menz say that Sachse and Innis failed to wear hard hats on the job site. Nothing of record, however, indicates that Sachse or Innis interfered in any manner with the union's performance of its obligations.

lence toward them, and toward other loyal union members, as inadmissible under Federal Rules of Evidence 607, 608 and 609.

Kelley and Menz first argue that Rule 404(b)[3] of the Federal Rules of Evidence provides for admissibility of other crimes, wrongs, or acts of the victim of a crime to show the victim's motive and intent in bringing criminal charges against the accused. Because Rule 404(a)[4] of the Federal Rules of Evidence includes within "persons" the accused, the victim, or a witness, it is contended that the term "person" in Rule 404(b) must be so construed. A second argument is that an issue on which "other crimes" evidence may be received was whether Sachse and Innis were the aggressors at Cape Girardeau on October 23, 1975. Thirdly, it is claimed that the "other crimes" evidence should have been admitted as part of a wide ranging cross-examination designed to attack the credibility and veracity of Sachse and Innis.

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[3] Fed. Rules Evid. Rule 404(b), 28 U.S.C. (hereinafter Rule 404(b)) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[4] Fed. Rules Evid. Rule 404(a), 28 U.S.C. provides as follows:

> Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
>
> (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

The relevance of "other crimes" evidence to the motive or intent of a person in certain circumstances has long been recognized.[5] The general rule has been stated:

> The rule is that the prosecution may *not* introduce evidence of other criminal acts *of the accused* unless the evidence is substantially relevant for some other purpose than to show a probability that he committed the crime on trial because he is a man of criminal character. McCormick on Evidence, § 190 at 447 (2d ed. 1972) (emphasis added; footnote omitted).

Thus the rule has been traditionally one of exclusion, permitting evidence of other crimes, wrongs, or acts of a person only under limited circumstances, to show the motive and intent of that person *as the accused* in a prosecution for a related offense. This court has recently observed that the statement of the "other crimes" rule contained in Rule 404(b) "is consistent with the common law and with the decisions of this Circuit." *United States v. Calvert*, 523 F.2d 895, 906 (8th Cir. 1975), *cert. denied*, —U.S.—, 96 S.Ct. 1106, —L.Ed.2d— (1976).

*It is clear that Rule 404 (b) must be confined to efforts to introduce evidence of "other crimes" of the accused. Adoption of the interpretation of Rule 404(b) urged by Kelley and Menz would convert that rule into one of inclusion and would render Rule 404(a)(2) and (3) nullities. Moreover, the subjection of victims and witnesses to attacks upon their characters, in cross-examination designed to show merely their motive in charging or testifying against the accused, would have a serious chilling effect upon the responsibility and willingness of victims and witnesses to testify.

* This paragraph was deleted by order of the Court of Appeals on January 24, 1977. See Appendix D.

[5] See, e.g., *State v. Raper*, 141 Mo. 327, 42 S.W. 935 (1897); *Kempe v. United States*, 151 F.2d 680 (8th Cir. 1945).

Nor was there an issue on which the proffered evidence was receivable. As this court observed in *United States v. Clemons*, 503 F.2d 486, 489 (8th Cir. 1974):

> Whether an issue has been raised for purposes of receiving evidence of other crimes depends upon both the elements of the offense charged and the nature of the defense presented (footnotes omitted).

The proffered evidence concerned events well prior to those at Cape Girardeau and was clearly unrelated to the elements of the offense charged. Kelley and Menz presented no defense of justification or excuse, such as self-defense. The issue of who might have been the aggressor was therefore not before the court.[6]

The attempted cross-examination finds no justification as a permissible attack on the veracity and credibility of the witnesses. Cross-examination concerning "other crimes" is not related to the witness' propensity for truthfulness or untruthfulness and its limitation is within the sound discretion of the trial judge. See, *United States v. Alberti*, 470 F.2d 878, 882 (2nd Cir. 1972), *cert. denied*, 411 U.S. 919, 93 S.Ct. 1557, 36 L.Ed. 2d 311 (1973). Determination that the proffered evidence was irrelevant, and therefore inadmissible, will not be disturbed absent a clear showing of abuse of discretion. *Cotton v. United States*, 361 F.2d 673, 676 (8th Cir. 1966); *United States v. Skillman*, 442 F.2d 542, 551-2 (8th Cir.), *cert. denied* 404 U.S. 833, 92 S.Ct. 82, 30 L.Ed.2d 63 (1971); *United States v. Campanile*, 516 F.2d 288, 292 (2nd Cir. 1975). The proffered cross-examination was not only irrelevant but unnecessary for the purposes alleged. The jury had sufficient information concerning the power struggle within Local 282 to make "a discriminating appraisal of the witnesses' motives and bias." *United*

[6] The numerous cases involving claims of self-defense and cited in the brief of Kelley and Menz are thus irrelevant.

States v. Baker, 494 F.2d 1262, 1267 (6th Cir. 1974). The fact that Sachse and Innis had been fired upon was attested to by independent and disinterested witnesses and provided fully adequate motivation for charging and testifying against Kelley and Menz. The district court committed no error in foreclosing cross-examination into alleged threats and violent acts of Sachse and Innis.

Consideration of the third issue raised on appeal convinces us that neither error nor abuse of discretion occurred in the exclusion of the grand jury testimony of Brenda Williamson, who was unavailable as a witness at trial. That testimony was irrelevant and thus inadmissible. Ms. Williamson was employed as a secretary for Alberici-Fruin-Colnon in Morriston, Missouri at the main building on the Noranda job-site. Her testimony related solely to events transpiring on October 24, 1975, the day after the attack on Sachse and Innis on which the present charges were based. Contrary to the urging of Kelley and Menz, Ms. Williamson's statement that she did not see a weapon on Kelley's person on October 24th cannot be considered relevant to any question of whether Kelley possessed a gun on October 23rd. Similarly, we find no merit in the argument that Ms. Williamson's having seen other men with Kelley and Menz on October 24th could have effected the jury's determination of the conspiracy count on which Kelley and Menz were convicted.

Kelley and Menz rely on the Fifth Amendment provision against double jeopardy in contending that the district court should have required election between conspiracy Count I and substantive Count II. That reliance is misplaced. Whether a substantive offense and a conspiracy to commit it are separate and distinct depends upon whether one requires proof of an essential element which the other does not. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L.Ed. 306, 309 (1932). The essence of conspiracy is the agreement to commit the crime. *Ianelli v. United States*, 420 U.S. 770,

777, 95 S.Ct. 1284, 1289, 43 L.Ed.2d 616, 622 (1975). Thus proof of an agreement was required for conviction on the conspiracy Count I in the present case. No such proof was required for conviction on the substantive Count II. Section 530, Title 29, United States Code states that "any person" who commits the acts there prohibited violates the statute.[7] There was no error in refusing to require election between Count I and Count II.

We find no error in the imposition of consecutive maximum sentences on Counts I and II. Separate, cumulative sentences may be imposed for conspiracy to commit an offense and for its actual commission. *Ianelli v. United States, supra* at 777-78; *United States v. Calvert, supra* at 914; *United States v. Bertucci*, 333 F.2d 292 (3rd Cir.), *cert. denied*, 379 U.S. 839, 85 S.Ct. 75, 13 L.Ed.2d 45 (1964).

The judgment below is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

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[7] *United States v. Schaefer*, 510 F.2d 1307 (8th Cir. 1975), *cert. denied*, 421 U.S. 978, 95 S.Ct. 1980, 44 L.Ed.2d 470 (1975) is cited by Kelley and Menz. In that case defendants were convicted of conspiracy to gamble and of gambling (18 U.S.C. §1955). This court reversed the conspiracy conviction as comprehending nothing more than the agreement which defendants necessarily entered in performing the substantive crime. One cannot gamble alone.

APPENDIX B

Judgment

United States Court of Appeals
For the Eighth Circuit

No. 76-1208

United States of America, Appellee,

vs.

Fred D. Kelley, Appellant.

Appeal from the United States District Court for the Eastern District of Missouri

This cause came on to be heard on the original designated record of the United States District Court for the Eastern District of Missouri and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment and sentence of the said District Court in this cause be and the same is hereby affirmed.

December 3, 1976

APPENDIX C

Judgment

United States Court of Appeals
For the Eighth Circuit

No. 76-1209

United States of America, Appellee,

vs.

Paul P. Menz, Appellant.

Appeal from the United States District Court for the Eastern District of Missouri

This cause came on to be heard on the original designated record of the United States District Court for the Eastern District of Missouri and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment and sentence of the said District Court in this cause be and the same is hereby affirmed.

December 3, 1976

APPENDIX D

Order

United States Court of Appeals
For the Eighth Circuit

September Term, 1976

No. 76-1208 United States of America, Appellee, vs. Fred D. Kelley, Appellant. No. 76-1209 United States of America, Appellee, vs. Paul P. Menz, Appellant.	Appeals from the United States District Court for the Eastern District of Missouri

The second full paragraph on page 7 of the slip opinion filed by this Court on December 3, 1976, and reading:

> "It is clear that Rule 404(b) must be confined to efforts to introduce evidence of "other crimes" of the accused. Adoption of the interpretation of Rule 404(b) urged by Kelley and Menz would convert that rule into one of inclusion and would render Rule 404(a) (2) and (3) nullities. Moreover, the subjection of victims and witnesses to

> attacks upon their characters, in cross-examination designed to show merely their motive in charging or testifying against the accused, would have a serious chilling effect upon the responsibility and willingness of victims and witnesses to testify."

is hereby ordered deleted.

Having made the indicated deletion, it is further ordered that petition for rehearing en banc filed by counsel for appellants and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

January 24, 1977